Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1805

AARON BRAVMAN,

Petitioner,

v.

BASSETT FURNITURE INDUSTRIES, INC. and BASSETT MIRROR CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, reported at 552 F.2d 90 (3rd Cir. 1977), is contained in the Appendix to respondents' Petition for a Writ of Certiorari, October Term, 1976, No. 76-1597, incorporated by reference and

not reproduced separately herein. The District Court delivered no opinion in granting defendants' motions for directed verdicts.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1977. Petitioner's timely petition for rehearing was denied by the Court of Appeals on March 23, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether two dominant furniture manufacturers who conspire, for the purpose of harming competition, to coerce their independent sales representative not to sell competing products, despite the inability of those manufacturers to provide a sufficient supply of merchandise to fill their representative's orders, have conspired to monopolize in violation of Section 2 of the Sherman Act.

(2) Whether a manufacturer which has undertaken a substantial course of damaging conduct designed to harm competition, by preventing or impeding the sale of competing products, without legitimate business purpose, has violated the proscription of Section 2 of the Sherman Act against attempts to monopolize.

STATUTORY PROVISIONS INVOLVED

In addition to Sections 1 and 4 of the Sherman Act, 15 U.S.C. §§1, 15 (Petition in No. 76-1597, p. 3), this case involves Section 2 of the Sherman Act, 15 U.S.C. §2, which provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

STATEMENT OF THE CASE

Petitioner Aaron Bravman, plaintiff below, relies upon the facts as stated in the majority opinion of the Court of Appeals (see Petition in No. 76-1597, pp. 2a-6a, 9a-12a, 13a-15a, 26a-28a, 29a-30a, 31a-33a), and as summarized in the Brief for Respondent in Opposition in No. 76-1597 (pp. 3-4), incorporated by reference.

The Court of Appeals described the implications of defendants' restrictive practices as follows (Petition, pp. 26a-27a):

> "Between May of 1970 and September of 1972 [when Bravman's representation was terminated in retaliation for his non-observance of the restraints] the restraints continued. During this period, however, Bravman was also subjected to the total withdrawal of Bassett Furniture's table products and Bassett Mirror's products, plus a drastic reduction in case goods. The attempt by Bassett Furniture to impose its exclusive representation policy upon Bravman in a period where such a restraint was seemingly

unreasonable on its face lends more weight to Bravman's claim of §4 standing. Such an attempt suggests not only that Bassett Furniture had substantial market power, but also exercised that power in a manner which may place unreasonable restraints on the distribution channels within the furniture industry."

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals, which holds that a conspiracy to exclude competing products from the marketplace, and having no legitimate business purpose, does not violate Section 2 of the Sherman Act, is clearly contrary to the decisions of this Court.

The majority in the Court of Appeals recognized that the restraints which defendants conspired to impose upon Bravman "were obviously aimed at enhancing the competitive position of the Bassett Companies vis-a-vis other furniture manufacturers . . . [and] were also aimed at enhancing the competitive position of Bassett's sales representatives" (Petition, p. 27a). The majority also found that the facts supported the conclusion that "Bassett Furniture, a comparative giant in the furniture manufacturing business, acting in concert with Bassett Mirror, imposed upon Bravman a restraint having no significant relationship to any legitimate business interest, but only an anti-competitive result" (Petition, p. 33a).

Thus, the Court of Appeals held, despite facts showing that defendants conspired to enhance their competitive position, without any legitimate business purpose, by keeping competing merchandise flowing in interstate commerce out of Bravman's territory in eastern Pennsylvania (see map of territory in Appellant's Appendix in the Court of Appeals, p. 566a), that there was no conspiracy "to monopolize any part of the trade or commerce among the several States," and therefore there could be no violation of Section 2 of the Sherman Act.

Bravman respectfully submits that the holding of the Court of Appeals is flatly in conflict with controlling decisions of this Court.

Monopoly is "the power to control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Here defendants, who were unable or unwilling to provide Bravman with sufficient furniture merchandise to sell, nevertheless, for no legitimate business reason, forced him not to sell competing merchandise. The conclusion is inescapable and unrebutted that defendants intended by their conspiracy to suppress the sale of competing merchandise. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225-27 (1939). "The Sherman Act forbids combinations of traders to suppress competition." *United States v. Parke, Davis & Co.*, 326 U.S. 29, 45 (1960).

> "When a combination through its actual operation results in an unreasonable restraint, intent or purpose may be inferred; even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to

> accomplish such an unreasonable restraint may render the actor liable under the Sherman Act."

United States v. Columbia Steel Co., 334 U.S. 495, 525 (1948).

> "[W]here businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct."

United States v. General Motors Corp., 384 U.S. 127, 146 (1966).

Despite the recognition by the Court of Appeals that the evidence supported a finding that defendants acted pursuant to a conspiracy reflecting a shared purpose to exclude competing goods from the marketplace,[1] it held (Petition, p. 34a):

> "There is, however, no evidence suggesting a sufficient nexus between the possibly illegal restraint on Bravman's services and the exclusion of other furniture manufacturers from his territory to support a jury finding of specific intent to monopolize furniture sales in that territory."

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1. Significantly, Bassett Mirror, itself larger than 87% of the furniture manufacturers in the country, could not support its own sales organization and therefore utilized the sales organization of Bassett Furniture (Appellant's Appendix in the Court of Appeals, pp. 261a-62a, 438a-39a).

The holding of the Court of Appeals, then, is that a conspiracy to exclude competition does not violate Section 2 of the Sherman Act unless it is successful, and can be proven to have achieved its unlawful objective. On the contrary, this Court has held that an unlawful agreement to exclude competitors *itself* violates Section 2. *American Tobacco Co. v. United States,* 328 U.S. 781, 789 (1946) ("Petitioners . . . might have been convicted here of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy, *i.e.,* to exclude actual and potential competitors from the cigarette field."). *See also United States v. Griffith,* 334 U.S. 100, 107 n.9 (1948); *United States v. Yellow Cab Co.,* 332 U.S. 218, 225-27 (1947); *United States v. Consolidated Laundries Corp.,* 291 F.2d 563, 573 (2d Cir. 1961); von Kalinowski, *Antitrust Laws and Trade Regulation,* §§9.02[1][a], 9.01[4], 9.02[5] (1976).

II.

This Court should resolve the conflict among the circuits and decide the important federal question of whether "dangerous probability of success" of achieving monopoly is an essential element of an "attempt to monopolize" under Section 2 of the Sherman Act.

Despite the long passage of time since the enactment of the Sherman Act in 1890, this Court has not yet settled the important question of whether a "dangerous probability of success" of achieving monopoly is an essential element of an "attempt to monopolize" under Section 2 of the Sherman Act.

In *Swift & Co. v. United States,* 196 U.S. 375, 396 (1905), the Court made the following statement:

> "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent, — for instance, the monopoly, — but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Com. v. Peaslee,* 177 Mass. 267, 272, 59 N.E. 55. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

In *American Tobacco Co. v. United States,* 328 U.S. 781, 785 (1946), this Court affirmed a criminal conviction under Section 2 of the Sherman Act where the trial court charged the jury as follows:

> "The phrase attempt to monopolize means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment."

The fact that the issue has not been settled, however, is evidenced by the conflict which exists among the circuits. The Ninth Circuit, in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75, *cert. denied*, 377 U.S. 993 (1964), rejected "the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize" (footnote omitted). *Lessig's* holding has been reaffirmed by the Ninth Circuit. See *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 12 (9th Cir. 1973), *cert. denied*, 417 U.S. 932, *reh. denied*, 419 U.S. 1028 (1974); *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1205 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976).

Other circuits have held that a "dangerous probability of success" of achieving monopoly power is an essential element of proof of an "attempt to monopolize" under Section 2 of the Sherman Act. *E.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 339 (4th Cir. 1959); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 (5th Cir. 1969); *United States v. Empire Gas Corp.*, 537 F.2d 296, 302-03 (8th Cir. 1976), *cert. denied*, 97 S. Ct. 1158 (1977); *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296, 305-06 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976). See generally, ABA *Antitrust Law Developments*, pp. 60-63 (1975).

Plaintiff submits that this Court should decide the issue and reject the notion that proof of an attempt to monopolize requires a showing of dangerous probability of success of achieving monopoly power where (as here) a defendant has

engaged in substantial, damaging conduct with no purpose other than the exclusion of competitors from the marketplace. So long as a defendant has been shown to have acted with an unlawful purpose to the exclusion of a legitimate business purpose, coupled with substantial, harmful conduct in furtherance of the unlawful purpose, there is no reason not to require the defendant to recompense persons injured in their business or property thereby.

Plaintiff's suggested view comports with the approach to attempts taken by contemporary criminal law doctrine. See ALI *Model Penal Code* §5.01 (Proposed Official Draft 1962); Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Colum. L. Rev. 571, 573 (1961) ("the crime [of attempt] becomes essentially one of criminal purpose implemented by an overt act strongly corroborative of such purpose . . .").[2]

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2. In *United States Steel Corp. v. Fortner Enterprises, Inc.*, 45 U.S.L.W. 4171, 4172 n.1 (February 22, 1977), this Court stated that "'increasing sales' and 'increasing market share' are normal business goals, not forbidden by §2 without other evidence of an intent to monopolize. . . . No inference of intent to monopolize can be drawn from the fact that a firm with a small market share has engaged in nonpredatory competitive conduct in the hope of increasing sales." The present case presents facts where large firms, with relatively small market shares because of the existence of many smaller companies, engaged in predatory conduct designed to reduce sales by competitors. *See Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 12-13 (9th Cir. 1973), *cert. denied*, 417 U.S. 932, *reh. denied*, 419 U.S. 1028 (1974) ("evidence of market power may be relevant, but it is not indispendable where a substantial claim of restraint of trade is made").

CONCLUSION

For the foregoing reasons the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

s/ Edwin P. Rome
s/ Roger F. Cox

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